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iPhone wills: how to guarantee excessive costs, delays and (often) media attention

by Keeli Cambourne, Deputy Editor SMSF Adviser and Matthew Burgess, Director, View Legal

An ongoing case before the courts has highlighted the issue of "informal wills", a top legal specialist has said. Matthew Burgess, director of View Legal, said although a decision appears yet to be released, according to media reports, the case involving Colin Peek and the use of an informal will has put the spotlight again on "statements of testamentary intention that do not meet formal legal requirements to be a valid will".

"In this case, the deceased left a digital note on his iPhone, titled 'the last will of Colin L Peek' setting out how his estate should be divided, which was created only days before his death," Burgess said.

"A friend and lawyer of Peek is acting on behalf of the primary beneficiary under the iPhone note will although the solicitor himself also stands to receive an entitlement if the electronic note is held to in fact be a valid will."
Burgess continued that it seems the deceased's family, who would likely inherit under the state-based intestacy regime if the iPhone notes are held to be invalid, are arguing the notes were simply a "working document" and never intended to amount to a final (informal) will.

"Broadly, courts can recognise informal statements as valid testamentary documents if it can be proven that the deceased intended the relevant documents to serve as their last will, even when basic widely known requirements, such as being signed by the willmaker and witnessed by two independent adults, are not met," he said.

He continued that while these types of cases are perhaps welcomed by lawyers specialising in the area of making the various court applications, the case is arguably a timely reminder of the financial and emotional material costs and lengthy delays that can be triggered by a failure to strictly comply with the statutory requirements that make a will valid.

"Importantly, similar requirements, although generally largely mandated by trust deeds, are also relevant in wider holistic estate planning areas. For example, for superannuation fund members wishing to make enforceable binding death benefit nominations," he said.

"The range and number of situations where informal wills such as testamentary directions not documented in a lawful will have been held by the courts to be valid are already wide, despite the enabling legislation being relatively recent."
Burgess said examples of these include a case where directions written in pencil on a plasterboard wall were held to be a valid will with the court accepting a photo of the wall, rather than the wall itself, being submitted to probate.

There have been a number of cases of couples who have had "mirror" wills prepared inadvertently signed their spouse's document instead of their own and the courts have held the documents to be valid.

"Then there was a 2024 decision from the UK, mentioned by numerous news outlets, where the deceased wrote what was held to be their valid last will across two food packaging boxes, one that had contained frozen fish, and the other mince pies," Burgess said.

Furthermore, Burgess said as technology becomes even more prevalent, court cases involving devices will continue to be a growth area.

“They are, unsurprisingly, very much a growth area with examples including an (unexecuted) Microsoft Word document created and saved on the deceased’s computer which was held to satisfy the requirements to be a 'document' capable of being treated as a valid last will,” he said.

“Another example dealt with information saved on the deceased’s iPhone shortly before he committed suicide which was held to be a ‘document’, that was intended to be the deceased's will.

“There was also a case that revolved around a document typed in the form of a will around two weeks before death on a home computer was permitted by the court to be treated as the deceased's last will, despite the fact there was evidence which indicated the document was printed and signed by the deceased, but then misplaced.”

Burgess continued there have also been numerous “SMS wills” and the decision in Re Nichol; Nichol v Nichol & Anor [2017] QSC 220 was one of the first reported cases despite the relevant text remaining unsent at the date of death.

In that case, the facts stated that the deceased committed suicide and his mobile phone was found near his body with an unsent text message found by his estranged spouse who took a screenshot of it.
The message stated:

“Dave Nic you and Jack keep all that I have house and superannuation, put my ashes in the back garden with Trish Julie will take her stuff only she’s ok gone back to her ex AGAIN I’m beaten . A bit of cash behind TV and a bit in the bank Cash card pin 3636
MRN190162Q

10/10/2016

My will”.

“The abbreviation MRN190162Q matched the deceased’s initials and date of birth. There was a paperclip symbol on the left-hand side of ‘My will’ and a smiley face on the other side,” Burgess said.

“In holding that the requirements of an informal will had been satisfied, perhaps the most crucial aspect of the case was that the court accepted that the text being unsent did not impact on the conclusion that the message was the last will of the deceased. In particular, the court confirmed that the fact the text message was unsent did not indicate that the text message was intended to have no effect.”

The court deemed that the likely intent of the deceased was that the text message be found after he had killed himself. If he had sent the message before he took his life, his brother would have invariably attempted to take steps to try to stop the deceased.

“The outcome of this conclusion was that the woman who found the text message received nothing from the estate,” Burgess said.

“The deceased’s estranged son also received nothing. Both of these people would have received assets under the intestacy regime had the text been shared, or if it had been held not to be a will.”